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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 448

HERMAN KRAVITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19–23) is reported at 303 F. 2d 700. The opinion of the district court (R. 9a–15a) [1] is unreported.

[1] The Appendix for Appellant in the court below will be cited as "R." "G. App." will refer to the Appendix for Appellee (government) in the court below. "App." will be used to refer to Appellant's Appendix in his original appeal from conviction (consisting of Volume 1, pages 1a to 388a; Volume 2, pages 389a to 764a; and an Additional Appendix, pages 765a to 776a). The latter appendix was filed in this Court with petitioner's prior petition for certiorari, No. 510, October Term, 1960.

JURISDICTION

The judgment of the court of appeals (Pet. 24) was entered on June 1, 1962. A petition for rehearing was denied on June 26, 1962 (Pet. 25). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied without a hearing petitioner's motion under 28 U.S.C. 2255 where the only question not previously presented on direct appeal from his conviction was whether petitioner had been deprived of due process of law when the sentencing judge, following pleas of guilty which petitioner later withdrew in favor of a trial by jury, read a presentence investigation report containing allegedly false and prejudicial information.

STATUTE AND RULE INVOLVED

28 U.S.C. 2255:

FEDERAL CUSTODY: REMEDIES ON MOTION ATTACKING SENTENCE

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * * * *

Rule 32(c) of the Federal Rules of Criminal Procedure:

SENTENCE AND JUDGMENT

* * * * *

(c) Presentence Investigation.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence of the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

* * * * *

STATEMENT

Petitioner [2] was charged with attempted evasion of individual and corporate income taxes and with conspiring to evade corporate taxes. Joseph Abrams was also named as a defendant in the indictments relating to the corporate taxes (App. 1a, 3a, 5a, 9a, 15a–21a). On July 3, 1958, petitioner pleaded guilty to all charges (App. 3a, 5a, 10a, 27a). When the government indicated it was ready to move for sentence, the court received from the probation officer and read the presentence investigation report. At a subsequent presentence report conference with petitioner's counsel, the court indicated that petitioner would most likely go to jail (R. 14a). Thereafter, on motion, petitioner was permitted to withdraw his pleas of guilty (App. 3a, 6a, 10a–11a, 33a).

[2] Petitioner's father, Samuel Kravitz, was also named a defendant and found guilty by the jury which convicted the petitioner. The father's conviction was set aside on appeal to the Court of Appeals for the Third Circuit for lack of sufficient evidence (281 F. 2d 581, 589).

Prior to petitioner's trial, the district court ordered a severance with respect to Abrams (App. 6a), an accomplice, who then testified on behalf of the government. The prosecutor, in his opening, informed the court and jury that "Abrams has been severed from the prosecution herein. He is not going to trial at this time in this district. He will, however, appear as a witness in this case, and will be called by the Government" (App. 765a). Under questioning by the prosecutor Abrams stated the facts as to his criminal record and disclosed that he was then serving a sentence (App. 222a–223a). On cross-examination, petitioner's counsel examined Abrams thoroughly concerning his criminal record and several indictments then pending against him (App. 294a–304a). Among other things, Abrams testified that he had pleaded guilty to charges of tax evasion (App. 294a–295a), that there was an understanding with the Justice Department that the indictments pending against him would be nolle prossed, but not "until after the trial of the Kravitz case" (App. 302a–304a). On further cross-examination he was asked whether orders for his future probation were conditioned upon his payment of an "astronomical" tax debt (App. 317a–319a). Petitioner's counsel stated that these questions were directed toward showing that Abrams "has a very great interest in shifting the tax that he owes on Mr. Kravitz or on Kravin Park * * *" (R. 317a). Abrams was also cross-examined concerning his repeated claim of Fifth Amendment privilege before the

McClellan Committee (R. 282a–290a). In summation, the prosecutor, referring again to Abrams' criminal record, stated that the government "didn't put * * * [Abrams] on * * * [the stand] with our blessings" (G. App. 5b), and, in charging the jury, the court warned that their scrutiny of the testimony of an accomplice "should be especially close, careful and rigid," since an accomplice "may be impelled * * * to pervert the truth" (G. App. 7b).

The jury found petitioner guilty on all counts (App. 719a–720a) and he was sentenced to serve a total of ten years in prison and to pay a fine of $30,000 (App. 751a). The conviction was affirmed on appeal, 281 F. 2d 581 (C.A. 3), and this Court denied certiorari, 364 U.S. 941. Petitioner commenced service of his sentence on February 6, 1961. Two days later he filed a motion for the reduction of sentence, which the district court, after hearing, denied. Petitioner then filed this motion to vacate sentence pursuant to 28 U.S.C. 2255, *supra*, pp. 2–3. The motion was denied without a hearing, by order entered September 26, 1961 (R. 1a, 16a; see also Memorandum Opinion, R. 9a–15a). On appeal from the denial of that motion, the court of appeals affirmed (Pet. 19–23) and denied a petition for rehearing (Pet. 25).

ARGUMENT

There is no merit to petitioner's contentions and no conflict of decisions. Petitioner obtained a complete review of the fairness of his trial and conviction on direct appeal at which he was represented by counsel

of his choice. One of the issues presented here was advanced and rejected there and the other was available at that time. The petition for a writ of certiorari should be denied.

The district court properly denied without hearing petitioner's contention (Pet. 10–14) that "vital information bearing upon the motive and credibility of Abrams" (R. 4a) was concealed from the jury, and there is no cause for review by this Court. Petitioner presented the same contention in his petition for rehearing in the court of appeals on direct appeal from his conviction (see pages 7–8 of Appellant's Petition for Rehearing, attached as an appendix, *infra,* pp. 10–12), and in his prior petition for certiorari, No. 510, October Term, 1960 (pp. 19–20). There is no substance to petitioner's attempt to argue here that additional facts disclosed since the rejection of this contention by the court of appeals and this court's denial of certiorari require a hearing.

Nor is there merit to petitioner's contention (Pet. 15–17) that he was deprived of a fair trial and sentencing when the judge, after entry of petitioner's guilty pleas and prior to his trial by jury, read a presentence investigation report. It was petitioner's decision to plead guilty which occasioned the court's receipt and review of the presentencing report in accordance with the requirements of Rule 32(c) of the Federal Rules of Criminal Procedure. The fact that immediately prior to sentencing petitioner was permitted to withdraw his pleas and afforded a trial

by jury did not require the judge to disqualify himself *sua sponte*.

Petitioner was advised of the court's receipt and review of the presentencing report and, in fact, it was the court's reaction to the contents of the report which moved petitioner to withdraw the guilty pleas. Nonetheless, petitioner made no request that the judge disqualify himself and no complaint in any of the post-trial proceedings. Having made that election, petitioner cannot now be heard to complain that he was denied a fair arbiter, especially where the court of appeals has reviewed the record and found that the trial was fair and where petitioner relies only on conjecture in asserting that the action of the trial court would have been more favorable had it not received the information contained in the presentence report.[3]

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[3] There is no conflict of decisions. In *Townsend* v. *Burke*, 334 U.S. 736, relied on by petitioner, the trial judge had misread readily verifiable information, *i.e.*, the defendant's record of prior convictions, and that error was compounded not only by the court's "facetiousness" (*id.* at 740), but by the defendant's lack of counsel. Similarly, *Smith* v. *United States*, 223 F. 2d 750 (C.A. 5), did not involve the contents of a presentence report required by Rule 32, which petitioner wishes to test here, but rather the question whether an F.B.I. agent told the truth when he privately informed the judge, before sentence, that the defendant had confessed *to the agent* various past offenses. In that case, moreover, the motion alleged that the defendant, having no attorney, was tricked and terrorized into pleading guilty.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1962.

APPENDIX

Pages 7–8 of the Petition for Rehearing filed in behalf of Herman Kravitz, appellant, in *United States* v. *Kravitz*, Nos. 13181, 13182, 13183, in the United States Court of Appeals for the Third Circuit (denied September 30, 1960):

* * * * *

4. The jury was misled in another vital particular, one as to which the defendant did not become apprised of all the facts until after the argument of this case in this Court.

At the very outset of his opening, the prosecutor advised the jury:

"Now, Joseph Abrams has been severed from the prosecution herein. He is not going to trial at this time in this district." (Additional Appendix, p. 765a)

From this, a jury would conclude that Abrams could be expected to be tried on the indictments against him, either in the District of New Jersey, or in another District. As a matter of fact, a motion had been made by Abrams on August 27, 1958, to transfer to another district (304a–305a) and the Court stated that it was still pending. Furthermore, the same Assistant United States Attorney filed an application to consolidate the trials of *all* defendants, which was granted, but on the date trial was to commence he moved for severance of the trial of Abrams pursuant to a stipulation consented to by Abram's counsel (Additional Appendix, pp. 766a–771a).

In the course of trial, Abrams said that the charges against him were to be "nolle prossed" (303a–304a, 311a). On the subject of nol. pros, the court below stated before the jury that a

lawyer and a prosecutor could not nol. pros a case, but that it was a matter for the court (311a–312a).

The only rational conclusion which the jury could have reached in light of the foregoing was that Abrams was going to trial at some time in some district, and that his talk about nol. pros was just that and no more.

On April 20, 1960, the indictments against Abrams were dismissed (Additional Appendix, pp. 772a–775a). But it also appears from the order of dismissal that permission to dismiss was received by the prosecutor from the Department of Justice by letter dated *November 20, 1959.*[6]

It is respectfully submitted that the pre-trial motions for consolidation and for severance, the statement of the prosecutor to the jury in his opening speech, and his silence when the subject of nol. pros was brought up on cross-examination, particularly in the light of the remarks of the trial judge at that time and in the charge, misled both the jury and the defendant, and amount to suppression of material evidence in the case by the prosecutor which would

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[6] The transcript of the hearing on the motion for dismissal discloses that one of the grounds upon which it was justified by the same assistant United States Attorney was that Abrams had testified at the trial of the Kravitzes, and "In the opinion of the Government, he did help the United States in its prosecution." But this assistant United States Attorney told this Court, at the argument on this appeal, that Abrams' testimony was not necessary and that the Government's case was adequate without it.

It should also be noted that the orders of dismissal (Additional Appendix, pp. 775a–776a) are incorrect in the statement that Abrams was then serving a sentence for evasion of his personal and corporate income taxes. He was serving a sentence for embezzlement (310a–311a).

have a direct bearing upon the motive, and therefore the credibility, of Abrams with respect to his testimony in the case.

We again allude to the obligations of the prosecuting attorney as summarized in *Berger* v. *United States, supra,* and refer to the most recent case of *Alcorta* v. *Texas,* 355 U.S. 28 (1957), basing its decision on Constitutional due process.

We submit that the prosecuting attorney was duty bound not to mislead the jury into thinking that Abrams would, or even might go to trial, and that he was duty bound to disclose the true facts of the situation so that they could be handled properly and without prejudice. Once the subject was brought out on cross-examination, he was also duty bound to state the facts. Certainly he was duty bound not to permit the appearance which was the result in the circumstances, that Abrams had nothing to gain from his testimony in this case.

* * * * * *